In the Supreme Court of the State of California

In re H.W., a Person Coming Under the Juvenile Court of Law.
THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,**
v.
H.W., **Defendant and Appellant.**

Case No. S237415

Third Appellate District, Case No. C079926
Sacramento County Superior Court, Case No. JV137101
The Honorable Stacy Boulware Eurie, Judge

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

Do pliers, used to remove the anti-theft device from a pair of jeans inside a Sears store, constitute a burglary tool under Penal Code section 466?

INTRODUCTION

Appellant H.W., a minor, appeals from an order adjudicating him a ward of the juvenile court. In October 2014, appellant entered a Sears department store in Yuba City with an empty backpack and a pair of pliers. He used the pliers to remove the anti-theft device from a pair of jeans before entering a restroom to hide the jeans inside the backpack. A loss prevention agent stopped him when he exited the store with the backpack without attempting to pay for the jeans.

In a wardship petition, it was alleged that appellant possessed burglary tools within the meaning of Penal Code section 466.[1] The juvenile court found the allegation to be true and adjudged appellant a ward of the court. The Court of Appeal affirmed the juvenile court's order. This Court granted review.

STATEMENT OF THE CASE

On April 14, 2015, the District Attorney of Sacramento County filed a petition under Welfare and Institutions Code section 602, alleging that appellant committed the following misdemeanors: in count I, theft (§ 484, subd. (a)); in count II, possession of burglary tools (§ 466); and in count III, trespass (§ 602.5). (CT 32-35.)

On July 1, 2015, the juvenile court held a contested jurisdiction hearing and sustained the petition on count I (theft) and count II (possession of burglary tools). (CT 69.) However, it found that count III had not been

[1] All further statutory references are to the Penal Code, unless otherwise specified.

proven beyond a reasonable doubt. (CT 69.) Appellant was adjudged a ward of the juvenile court, placed on juvenile probation, committed to juvenile hall for two days with two days credit for time served, and given a maximum term of confinement of eight months. (CT 69-70.)

On August 9, 2016, the Court of Appeal affirmed the juvenile court's order, finding that sufficient evidence sustained the finding that appellant possessed a burglary tool within the meaning of section 466. (Slip Opinion at p. 10.) On September 27, 2016, appellant filed a petition for review in this Court, which was granted on November 22, 2016. (Cal. Supreme Ct. No. S237415.)

SUMMARY OF THE ARGUMENT

The Court of Appeal below properly affirmed the juvenile court's judgment that appellant's pliers, used to remove an anti-theft device from a pair of jeans inside a Sears store, constituted burglary tools under section 466. The plain and ordinary meaning of the statute demonstrates it clearly contemplates the inclusion of pliers as burglary tools. Additional extrinsic aids, including the doctrine of *ejusdem generis*, also support this conclusion. A consideration of the statute in light of the crime of burglary in California further demonstrates the only requisite intent under section 466 is that a defendant intend to use a burglary tool to commit any theft or felony inside the building.[2] And finally, although this Court's grant of review does not encompass the issue of Proposition 47's potential effect on section 466, nothing in Proposition 47 demonstrates the voters' intent to reduce or otherwise affect convictions under the statute for possession of burglary tools, which is already a misdemeanor. Therefore, the juvenile court

[2] For brevity, respondent refers to "buildings" as encompassing the other structures and/or vehicles enumerated in section 466.

properly adjudged appellant a ward of the court for possession of burglary tools.

ARGUMENT

I. PLIERS CONSTITUTE AN "INSTRUMENT OR TOOL" UNDER SECTION 466

Appellant contends that pliers are not burglary tools within the meaning of section 466. (AOBM[3] 2, 8-30.) Specifically, he contends that pliers are not among the devices enumerated in section 466 and also do not qualify as an "instrument or tool" within that section. (AOBM 8-30.) Respondent disagrees. While the pliers in this case do not fall within the specific devices listed in section 466,[4] they do constitute an "other instrument or tool" as defined in the statute; pliers are contemplated under the plain meaning of "instrument or tool" and are similar to the enumerated devices in both function and purpose.

Although appellant argues the evidence is insufficient to support his conviction for possession of burglary tools, his argument essentially contests the appellate court's interpretation of section 466. As such, the issue before this Court is one of statutory interpretation. Questions of statutory interpretation are reviewed de novo. (*People v. Prunty* (2015) 62 Cal.4th 59, 71.)

Section 466 provides in relevant part:

> Every person having upon him or her in his or her possession a picklock, crow, keybit, crowbar, screwdriver, vise grip pliers, water-pump pliers, slidehammer, slim jim, tension bar, lock pick gun, tubular lock pick, bump key, floor-safe door

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[3] Appellant's Opening Brief on the Merits.

[4] *Particular* types of pliers are named in the list of enumerated devices in section 466 ("vise grip pliers, water-pump pliers"), but no evidence in the record demonstrates that the pliers appellant used were either vise grip or water-pump pliers.

> puller, master key, ceramic or porcelain spark plug chips or pieces, or other instrument or tool with intent feloniously to break or enter into any building, railroad car, aircraft, or vessel, trailer coach, or vehicle as defined in the Vehicle Code, . . . is guilty of a misdemeanor.

(§ 466.) Thus, to prove a violation for possession of burglary tools under section 466, the prosecution must prove: "(1) possession by the defendant; (2) of tools within the purview of the statute; (3) with the intent to use the tools for the felonious purposes of breaking or entering." (*People v. Southard* (2007) 152 Cal.App.4th 1079, 1085 (*Southard*).)

In interpreting a statute, this Court applies well-settled canons of statutory construction. (*People v. Arias* (2008) 45 Cal.4th 169, 177 (*Arias*).) The goal is to "ascertain the Legislature's intent in order to effectuate the law's purpose." (*Ibid.*, internal citations omitted.) "We begin by examining the words of the respective statutes; if the statutory language is not ambiguous, then we presume the Legislature meant what it said, and the plain meaning of the language governs." (*In re Young* (2004) 32 Cal.4th 900, 906, citing *People v. Walker* (2002) 29 Cal.4th 577, 581 (*Walker*).) The statute's words are given their "usual and ordinary meaning." (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601.) "All [Penal Code] provisions are to be construed according to the fair import of their terms . . . ." (§ 4.) In giving meaning to the statute's words, this Court may draw from sources including dictionaries and the common language of the people. (*Nix v. Hedden* (1893) 149 U.S. 304, 307 ["Beyond the common knowledge which we have on this subject, very little evidence is necessary, or can be produced"].) However, a literal construction should not be adopted if it is contrary to the legislative intent apparent in the statute. (*People v. Shabazz* (2006) 38 Cal.4th 55, 67, internal citations omitted.)

If a statute's language is unambiguous, it may still have "latent ambiguity" if the plain meaning would result in absurd consequences. (See

People v. Leiva (2013) 56 Cal.4th 498, 510 [while plain meaning of the word "toll" in section 1203.2 appears "unambiguous on its face," it has a "latent ambiguity" where the plain meaning would result in "absurd consequences"]; *Stanton v. Panish* (1980) 28 Cal.3d 107, 115 [language that appears unambiguous on its face may be shown to have a latent ambiguity when the plain meaning would lead to unreasonable results].) Language of a statute is also ambiguous when it is "susceptible to more than one reasonable construction" (*Diamond Multimedia Systems v. Superior Ct.* (1999) 19 Cal.4th 1036, 1055) or "amenable to two alternative interpretations" (*Arias*, *supra*, 45 Cal.4th at p. 177). Ambiguity may otherwise exist where appellate courts have reached differing interpretations of the statute. (See *People v. Leiva*, *supra*, 56 Cal.4th at p. 510 [reviewing legislative history, statute objectives, and public policy after noting "the split between the Courts of Appeal reflects uncertainty" in interpreting statute].)

If this Court determines that a statute is ambiguous or lacks clarity, it "may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history." (*Walker*, *supra*, 29 Cal.4th at p. 581.) In considering extrinsic sources, this Court "strive[s] to select the construction that comports most closely with the Legislature's apparent intent, with a view to promoting rather than defeating the statutes' general purposes." (*Ibid.*) "The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387.) The provisions of the Penal Code are construed "with a view to effect its objects and to promote justice." (§ 4.)

Here, contrary to appellant's contention (AOBM 14, 27), the phrase "other instrument or tool" in section 466 is unambiguous and includes

pliers like the ones appellant possessed in this case. "Instrument," as used in context here, is commonly understood as an "implement," especially "one designed for precision work." (Merriam-Webster's Dict. (10th college ed. 1998) p. 606, col. 2.) Likewise, "tool" is defined as "a handheld device that aids in accomplishing a task." (*Id.* at p. 1243, col. 1.) In the context of the enumerated items listed in section 466, which are all commonly understood as instruments or tools, the phrase "other instrument or tool" is "not amenable to two alternative interpretations." (*Arias*, *supra*, 45 Cal.4th at p. 177.) As the appellate court in *People v. Kelly* (2007) 154 Cal.App.4th 961, 967 (*Kelly*), properly noted, "We do not consider the language proscribing possession of 'any instrument or tool' with the specified felonious intent to be inherently ambiguous."

"Pliers" fall within the unambiguous phrase "other instrument or tool." The modern definition of "pliers" is "a small pincers for holding small objects or for bending and cutting wire." (Merriam-Webster's Dict., *supra*, at p. 894, col. 2.) It is commonly understood that "pliers" constitute tools. (See, *e.g.*, *People v. Osborne* (2009) 175 Cal.App.4th 1052, 1058-1059 [officer observed "several tools (screwdrivers, pliers, etc.)"]; *People v. Griffith* (1971) 19 Cal.App.3d 948, 950 ["numerous tools" included "primarily pliers and screwdrivers"].) By definition and its understanding in common language, pliers constitute tools. Thus, because pliers are commonly understood to constitute an "instrument or tool" in the unambiguous terms of section 466, appellant's pliers constitute burglary tools within the meaning of the statute.

People v. Harris (1950) 98 Cal.App.2d 662 (*Harris*) is instructive. There, the defendant was found in possession of "a steel wood chisel . . . about six inches long, three-quarters of an inch wide, an eighth of an inch thick, and ha[d] a sharpened point." (*Id.* at p. 663.) He was charged and convicted for unlawfully possessing a "sharp instrument" under section

4502. (*Ibid.*) At that time, section 4502 prohibited a prisoner in state prison from possessing, carrying upon his person, or having under his custody, among other things, "any dirk or dagger or sharp instrument." (*Ibid.*) On appeal, the defendant argued that the statute was invalid because it did not define the phrase "sharp instrument" and was thus ambiguous. (*Id.*, at p. 666.)

In rejecting the defendant's argument, the appellate court observed, "Criminal statutes are not to be strictly construed, but all the provisions of the Penal Code are to be construed according to the fair import of their terms, with a view to effect is objects and to promote justice." (*Harris*, *supra*, 98 Cal.App.2d at p. 666, internal citations omitted.) It noted, "The Legislature was not required to list every type of sharp instrument in the statutory prohibition. All that is required is that the crime must be clearly defined so that any reasonable person will know what constitutes a violation." (*Ibid.*) Section 4502 "was passed to protect inmates and officers of state prisons from the perils of assaults with dangerous weapons perpetrated by armed prisoners." (*Ibid.*, internal citations omitted.) In light of the circumstances, the defendant "obviously knew what the statute meant, and knew that he was violating it." (*Ibid.*) Other California Courts of Appeal have similarly found the phrase "sharp instrument" unambiguous. (See *People v. Crenshaw* (1946) 74 Cal.App.2d 26; *People v. Morales* (1967) 252 Cal.App.2d 537, 539-541 [rejecting contention that statute is unconstitutionally broad and vague]; *People v. Custodio* (1999) 73 Cal.App.4th 807, 811-813 [statute not unconstitutionally vague].)

Similarly here, the phrase "other instrument or tool" is unambiguous. Both "instrument" and "tool" have well-established definitions and meanings in common language. As in section 4502, the statute prohibiting possession of burglary tools also enumerates specific devices that are unlawful to possess. (§ 466.) The Legislature is not required to list *every*

type of instrument or tool that qualifies as a burglary tool under section 466. (*Harris*, *supra*, 98 Cal.App.2d at p. 666.) Like section 4502, the burglary tools statute serves a clear purpose—to deter burglaries by affording law enforcement officers the ability to apprehend would-be burglars before they have the opportunity to commit the offense. (Annot., Validity, Construction, and Application of Statutes Relating to Burglars' Tools (1970) 33 A.L.R.3d 798, 805, § 2[a]; 3 Wharton's Criminal Law (15th ed., updated Sept. 2016) § 333 ("Wharton's Criminal Law").) Thus, similar to the phrase "sharp instrument" following "dirk or dagger" in section 4502, the phrase "other instrument or tool" following an enumerated list of devices in section 466 is unambiguous.

Additionally, the phrase "other instrument or tool" does not create latent ambiguity when read in context of section 466. A direct reading of the burglary tool statute reflects the Legislature's intent to punish those who possesses an enumerated object or "other instrument or tool with intent feloniously to break or enter" into a building. (§ 466.) It does not take any stretch of the imagination to believe that someone could (and would) use pliers to effectuate a burglary.[5] Therefore, reading "other instrument or tool" to include pliers does not result in "absurd" or "unreasonable" consequences or results. (*Leiva*, *supra*, 56 Cal.4th at p. 510; *Stanton*, *supra*, 28 Cal.3d at p. 115.)

However, even if this Court determines that the phrase "other instrument or tool" is ambiguous, the application of extrinsic aids demonstrates that pliers qualify as a burglary tool under section 466. One such extrinsic source used to interpret statutes is the doctrine of *ejusdem generis*. (*Arias*, *supra*, 45 Cal.4th at p. 180.) This is the same doctrine

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[5] The issue of whether the "instrument or tool" must be used for the actual "breaking or entering" of a building is discussed *post*.

applied by the Courts of Appeal in interpreting section 466. (See generally *People v. Gordon* (2001) 90 Cal.App.4th 1409, 1412-1413 (*Gordon*), superseded by statute as stated in *People v. Diaz* (2012) 207 Cal.App.4th 396 (*Diaz*); *Kelly*, *supra*, 154 Cal.App.4th at p. 967.) This doctrine "applies when general terms follow a list of specific items or categories, or vice versa." (*Gordon*, at p. 1412.) Under this doctrine, "application of the general term is 'restricted to those things that are similar to those which are enumerated specifically.'" (*Ibid.*, citing *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1160, fn. 7.) As applied here, "the meaning of the words 'or other instrument or tool' in section 466 is restricted to a form of device similar to those expressly set forth in the statute." (*Gordon*, *supra*, at p. 1412.)

"Pliers" are similar to the devices expressly enumerated in section 466 because they are also instruments or tools with similar uses and functions. The enumerated tools in section 466 are ones that may be used to forcibly gain access to property; more specifically, they may be used to force open or bypass entryways and locks. As appellant notes, the listed "vise grip pliers" and "water pump pliers" are simply pliers that serve additional functions, such as having the ability to lock into position or adjust without the distance in the handle growing wider. (AOBM 12, fns. 8 & 9.) It is not difficult to imagine the ways in which a pair of pliers may similarly be used to gain access to property, by forcibly holding something in place or providing the force necessary to pull something up or out. Under the reasoning provided in *Gordon*, pliers have the same "function," accomplish the "same general purpose," are "similar," and surely "resemble[]" the devices listed in section 466. (*Gordon*, *supra*, 90 Cal.App.4th at pp. 1412-1413.) Under the doctrine of *ejusdem generis*, pliers constitute an "instrument or tool" within the meaning of section 466.

Appellant argues that pliers are dissimilar from the enumerated devices in section 466, relying on *Gordon*'s analysis of the devices as "keys or key replacements, or tools that can be used to pry open doors, pick locks, or pull locks up and out." (AOBM 20, 28, citing *Gordon*, *supra*, 90 Cal.App.4th at p. 1412.) But this interpretation of the listed devices is too narrow and improperly restricts the characteristics and functions of the devices. Indeed, in response to *Gordon*, the Legislature specifically added "ceramic or porcelain spark plug chips or pieces" among the enumerated burglary tools. (*Kelly*, *supra*, 154 Cal.App.4th at p. 966.) Unlike devices that pry open doors, pick locks, or pull locks up and out, ceramic spark plug pieces are used to "shatter" car windows for the purpose of burglarizing the vehicle. (*Gordon*, at p. 1411.) As the Court in *Kelly* explained, "The legislative response to *Gordon* undermines its conclusion that section 466 was intended to encompass only items that can be used to unlock, pry, or pull something open." (*Kelly*, at pp. 966-967.) Even the appellate court in *Southard*, which appellant relies upon, recognized that the defendant there "was found in possession of numerous tools that *clearly fall within the scope of section 466*," including "multiple pairs of *pliers*" and "a large pair of *bolt cutters*." (*Southard*, *supra*, 152 Cal.App.4th at p. 1090, italics added.) This conclusion, reached without any difficulty, further undermines appellant's reliance on *Gordon* in arguing that section 466 was not intended to include pliers or any instrument or tool capable of cutting.

In any event, to the extent vise-grip or water-hose pliers may clamp and hold something in place to either pry something open, pick locks, or pull locks up and out (*Gordon*, *supra*, 90 Cal.App.4th at p. 1412), pliers function similarly. (See AOBM 12, fns. 7-9 [defining "pliers," "vise-grip pliers," and "water pump pliers"].) The fact that generic pliers may *additionally* be used to "cut" does not detract from its similarity in function to enumerated devices like vise grip or water pump pliers.

Relying on *Diaz*, *supra*, 207 Cal.App.4th at page 404, for a limited interpretation of section 466 that includes only those tools used to gain access *into* a building, appellant further argues: "There was no evidence [his] pliers could be used for the purpose of 'breaking, entering or otherwise gaining access' *into* a building . . . ." (AOBM 28, original italics.) He continues that an anti-theft device does not "prevent a person from gaining access *into* property." (AOBM 28, italics added.) However, a burglary tool is used "to break into *or gain access to*" a victim's property. (*Diaz*, at pp. 396, 404, italics added.) Such a tool "must be for the purpose of breaking, entering, *or otherwise gaining access to* the victim's property." (*Id.* at p. 404, italics added.) Because appellant used the pliers with the felonious intent to gain unlawful access *to* the jeans, property belonging to Sears, the reasoning of *Diaz* does not preclude his adjudication for possession of burglary tools.[6]

Appellant also relies on other statutes found in chapter three, title 13, of the Penal Code, which he contends "prohibit the possession, sale, manufacture or duplication of enumerated tools designed for 'gaining access' *into* property." (AOBM 18, italics added.) Appellant's interpretation is too narrow. Many, if not most, of these statutes contemplate more than just gaining access *into* property. For example, section 466.3 expressly prohibits certain devices "designed to open, break into, *tamper with, or damage* a coin-operated machine." (§ 466.3, subd. (a),

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[6] Appellant also contends that an anti-theft device is not a "lock" to prevent a person from gaining access to property—rather, the device "is designed to discourage theft by irreparably damaging the merchandise with ink." (AOBM 28.) But, by its own name and definition, an "anti-theft device" is one that seeks to prevent theft. There is no reason why an anti-theft device that may damage merchandise when forcefully removed may not also serve its intended purpose to prevent and deter theft, much like a lock.

italics added.) Section 466.5 prohibits possession of a vehicle master key "with the intent to use it in the *commission of an unlawful act*" or with the intent to use such a key to "operate the ignition switch of any motor vehicle . . . or . . . to open a *wheel lock* on any motor vehicle." (§ 466.5, subds. (a) & (b), italics added.) Section 466.6 prohibits manufacture of a key "capable of *operating the ignition* of a motor vehicle or *personal property* registered under the Vehicle Code." (§ 466.6, subd. (a), italics added.) Section 466.65 similarly prohibits devices "designed to bypass the factory-installed ignition of a motorcycle in order to start the engine." (§ 466.65, subd. (a).) Sections 466.7 and 466.9 also refer only to the intent "to use [the prohibited device] . . . in the commission of an unlawful act." (§§ 466.7, 466.9, subds. (a) & (b).) In other words, the statutes in chapter three, title 13, of the Penal Code expressly contemplate possessing certain devices with an intent *other than* to use the device for "gaining access into property." (AOBM 18.) Appellant's reliance on these statutes is misplaced.

Appellant's fear that the inclusion of "pliers" in the burglary tools statute will lead to unintended expansion of that statute to include "common objects such as rocks or pieces of metal" (AOBM 29), "any common item" (AOBM 18), and even "a stick" (AOBM 10), is similarly groundless. As appellant himself acknowledges (AOBM 17, citing Stats. 2002, ch. 335, § 1), the Legislature made it abundantly clear that it did not intend for such objects to fall within the statute. (*Kelly*, *supra*, 154 Cal.App.4th at p. 968, fn. 2 [noting that "the Legislature expressly clarified its intent not to include rocks or pieces of metal"].) And, as discussed above, "pliers" fall within the phrase "instrument or tool" as it is used in section 466. In stark contrast, common objects like rocks and sticks are neither instruments or tools as those terms are commonly understood. In addition to the Legislature's clear and express intent that common objects are not included under section 466, appellant's argument that the inclusion

of "pliers" in section 466 will permit prosecution based on the possession of common objects such as sticks and rocks is unfounded and should be rejected.

In sum, the common understanding of the term "pliers" fits within the unambiguous phrase "instrument or tool" in section 466. Appellant's argument should be rejected by this Court.

II. SUFFICIENT EVIDENCE DEMONSTRATES APPELLANT HARBORED THE NECESSARY INTENT UNDER SECTION 466

Appellant argues insufficient evidence supports a finding he possessed the requisite intent under section 466. (AOBM 30-36.) Specifically, he contends his intent to use the pliers to commit theft inside Sears was insufficient under the statute because: (1) he did not intend to or, in fact, use the pliers to "break, enter or otherwise gain access into Sears"; and (2) under Proposition 47, his offense constituted shoplifting, a misdemeanor, and thus insufficient evidence demonstrated "felonious intent." (AOBM 30-36.) Respondent disagrees. As a threshold matter, appellant's Proposition 47 claim is not properly before this Court because this Court's grant of review does not encompass that issue. In any event, the only intent required under section 466 is that a defendant possess the burglary tool with the intent to use the tool to commit any theft or felony inside a building; a "burglarious" intent.

A. Appellant Possessed the Requisite Intent under Section 466—the Intent to Use a Burglary Tool to Commit Any Theft or Felony Inside a Building—Because He Intended to Use the Pliers to Effectuate the Theft of the Jeans inside Sears

Appellant concedes that he possessed the pliers with the intent to commit theft inside the Sears store. (AOBM 35.) He further concedes that he "used [the] pliers to effectuate a petty theft" of the jeans. (AOBM 35.) Because the only intent required under section 466 is the intent to use the

burglary tool to commit any theft or felony inside a building, the evidence supports the juvenile court's finding that he possessed burglary tools within the meaning of section 466.

As discussed *ante*, the goal of statutory interpretation is to "ascertain the Legislature's intent in order to effectuate the law's purpose." (*Arias*, *supra*, 45 Cal.4th at p. 177.) To that end, this Court will consider the language of the text, its plain meaning, and other extrinsic sources if necessary. (*Walker*, *supra*, 29 Cal.4th at p. 581.)

In order to sustain a conviction for possession of burglary tools under section 466, the offender must possess the instrument or tool "with intent feloniously to break or enter into any building." (§ 466.) This has been interpreted to require "the intent to use the tools for the felonious purposes of breaking or entering." (*Southard*, *supra*, 152 Cal.App.4th at p. 1085.)

Contrary to what appellant contends (AOBM 18, 34), a defendant charged with possession of burglary tools need not intend to *use* the instrument or tool to actually "break or enter into" a building. Rather, section 466 requires that the defendant possess the burglary tool only "with intent feloniously to break or enter into" a building. (§ 466.) In other words, it is the defendant's possession of the burglary tool *with the intent to commit burglary* that violates section 466. And it is this intent "to commit grand or petit larceny or any felony" that is required under section 466, not the intent to actually "break" or forcibly enter into a building. (§ 459 [defining burglary].)

The conclusion that the intent element in burglary is the same as that in possession of burglary tools is supported by an understanding of how burglary has developed in California. At common law, burglary was defined as the "breaking and entering the dwelling house of another in the nighttime with intent to commit a felony." (*People v. Sparks* (2002) 28 Cal.4th 71, 78; accord 2 Jones' Blackstone (1916) p. 2431 (Blackstone).)

In California, burglary was codified in 1850. (*Ibid.*) As codified, the statute abolished the common law requirement of "breaking," thus reading, "Every person who shall in the night time forcibly break and enter, *or without force* (the doors and windows being open) enter into any dwelling house, . . . with intent to commit . . . larceny, or other felony, . . . shall be punished by imprisonment in the State prison . . . ." (Stats. 1850, ch. 99, § 58, p. 235, original parens, italics added.) With the enactment of the Penal Code in 1872, burglary was essentially defined the same way: "Every person who, in the night-time, forcibly breaks and enters, *or without force* enters through any open door, window, or other aperture, any house, . . . with intent to commit grand or petit larceny, or any felony, is guilty of burglary." (Stats. 1872, ch. 2, § 459, pp. 176-177, italics added.) Today, the burglary statute provides: "Every person who enters any house, . . . or other building, . . . with intent to commit grand or petit larceny or any felony is guilty of burglary." (§ 459.) As the appellate court here correctly noted, California has not required the element of "breaking" or forcible entry into a building since codifying the offense of burglary in 1850. (Slip Opinion at p. 9.)

Consistent with California law regarding burglary, section 466 prohibits possession of a burglary tool "with intent feloniously to break or enter into any building . . . ." (§ 466.) The statute, fittingly titled "*Burglary* instruments or tools" (§ 466, italics added), seeks to prohibit possession of such an instrument or tool with the intent to commit burglary—the "intent to commit grand or petit larceny or any felony" (§ 459). Because burglary in California does not require the element of "breaking" or forcible entry into a building, neither does the offense of possessing burglary tools. Indeed, as the appellate court in *Southard* observed, the offense of possessing burglary tools is "complete when the tools [are] procured with a design to use them for a *burglarious* purpose. . . . It [is] not necessary to

allege or prove an intent to use them in a particular place, or for a special purpose, or in any definite *manner*." (*Southard, supra*, 152 Cal.App.4th at p. 1088, citing *Commonwealth v. Tivnon* (1857) 74 Mass. 375, 380.) Requiring the prosecution to prove that a defendant possessed the intent to use the burglary tool to break or enter a building would interject the additional requirement of "breaking," an element California long ago eliminated from burglary.

Instead, the development of the law of burglary in California demonstrates that the requisite intent under section 466 is that the defendant possess a burglary tool with the intent to use it to gain access to real *or* personal property. At common law, burglary was "essentially an offense against habitation and occupancy." (*People v. Gauze* (1975) 15 Cal.3d 709, 712, internal citations omitted.) The common law "clearly sought to protect the right to peacefully enjoy one's own home free of invasion." (*Ibid.*) Once codified in California law, the expansion of buildings protected and the elimination of the requirement that the crime be committed at night "signifie[d] that the law is no longer limited to safeguarding occupancy rights. . . . [T]he Legislature has preserved the concept that burglary law is designed to protect a possessory right in property . . . ." (*Id.* at pp. 713-714.) In other words, the law of burglary in California developed to not only include an interest in protecting an individual's possessory right in his building, but also his personal property.

This intent to protect an individual's personal property is reflected in the legislative history of section 466 as well. In 1977, the Legislature amended section 466 to prohibit possession of burglary tools with intent feloniously to break or enter into, inter alia, any "vehicle as defined in the Vehicle Code." (Stats. 1977, ch. 1147, § 2.) The Legislature also added sections 466.6 and 466.7, regulating the manufacture or possession of motor vehicle keys. (*Ibid.*) This legislation was intended to deal with

vehicle *thefts*. As noted in the enrolled bill report, the bill was in response to "tremendous financial loss due to motor vehicle *thefts*." (Enrolled Bill Report, Assem. Bill 38, p. 2 (June 21, 1977), italics added.) Accordingly, "This bill would help reduce the number of vehicles stolen." (*Ibid.*) In other words, the Legislature understood section 466 as a deterrent against theft; specifically, theft of personal property. (See § 484, subd. (a) [prohibiting the "driv[ing] away [of] the personal property of another"]; *People v. Magallanes* (2009) 173 Cal.App.4th 529, 535 [motor vehicle "is unquestionably personal property"].)

In sum, the only intent required under section 466 is that a defendant possess a burglary tool with the intent to commit any theft or felony inside a building, not that he intend to use the tool to actually break or enter into the building. Because appellant had the intent to use the pliers to steal the jeans from Sears, he possessed burglary tools within the meaning of section 466.

B. The Enactment of the Shoplifting Statute in Section 459.5 under Proposition 47 Does Not Negate or Invalidate Appellant's Adjudication for Possession of Burglary Tools

Finally, appellant argues that Proposition 47 essentially negates his adjudication for possession of burglary tools. (AOBM 32-36.) In particular, he contends, with the creation of the crime of "shoplifting" under section 459.5, he could not have had the requisite "felonious intent" or acted with a "burglarious purpose." (AOBM 36.) As a threshold matter, this issue is not properly before this Court because the Court of Appeal did not address the Proposition 47 issue, appellant did not file a petition for rehearing, and appellant failed to include this issue in his petition for review in this Court. In any event, respondent disagrees. The language and intent of Proposition 47 do not contemplate any collateral effect on possession of burglary tools, a misdemeanor.

1. Appellant's claim that Proposition 47 precludes a finding that he possessed the requisite intent is not properly before this Court

As a threshold matter, appellant's claim that he did not possess the requisite intent under section 466 in light of Proposition 47 is not properly before this Court. "As a policy matter, on petition for review the Supreme Court normally will not consider an issue that the appellant failed to timely raise in the Court of Appeal." (Cal. Rules of Court, rule 8.500, subd. (c)(1).) Failure to assert a claim before the Court of Appeal forfeits the claim. (*People v. Norris* (1985) 40 Cal.3d 51, 57.) Additionally, failure to petition for review on any particular grounds forfeits an argument based on such grounds. (*People v. Superior Court* (*Aishman*) (1995) 10 Cal.4th 735, 741; see *People v. Gionis* (1995) 9 Cal.4th 1196, 1121, fn. 19 [declining to consider claims of prosecutorial misconduct that were not raised in petition for review or properly presented in answer to petition].) Although a defendant may petition for review without petitioning for rehearing in the Court of Appeal, "as a policy matter[,] the Supreme Court normally will accept the Court of Appeal opinion's statement of the issues and facts unless the party has called the Court of Appeal's attention to any alleged omission or misstatement of an issue or fact in a petition for rehearing." (Cal. Rules of Court, rule 8.500, subd. (c)(2).)

At the contested jurisdictional hearing, appellant's trial counsel mentioned Proposition 47 only in closing argument. (RT 97-98.) Counsel argued, "Even if we were to assume at face value that [the People] could meet their burden of proof, which I argue that they cannot, under Prop 47, any -- you know, a value of $68, that's an automatic misdemeanor. If you come in and take a pair of pants, that's a misdemeanor." (RT 97-98.) Counsel did not argue that Proposition 47's creation of the shoplifting statute precluded a finding that appellant possessed the requisite intent.

(RT 95-100.) The prosecutor did not address counsel's claim, and neither did the juvenile court in sustaining the wardship petition. (RT 100-102.)

In the Court of Appeal, appellant argued in his opening brief that his conduct "fell squarely within the parameters of Penal Code section 459.5," and therefore "the prosecution could not have properly charged [him] with *burglary*." (AOB[7] 34-35, italics added.) Notably, appellant did not assert that the prosecution could not have charged him with possession of burglary tools, which could have presented the Court of Appeal with the issue of whether he possessed the requisite intent in light of Proposition 47. Although one could surmise that appellant intended to argue that the prosecution could not have charged him with *possession of burglary tools*, he includes a footnote that provides the language of section 459, the statute on *burglary*. (AOBM 35.) Thus, there can be no question that appellant failed to raise the specific issue of whether Proposition 47 precludes a conviction (or juvenile adjudication) for possession of burglary tools. And, although appellant did refer to the intent to commit shoplifting in his reply brief (ARB[8] 6, 10-11), the issue was not originally raised in his opening brief and, in any event, he failed to present the issue of whether Proposition 47 necessarily redefined the intent element in section 466. This failure is apparent in light of the Court of Appeal's decision, which made no reference to Proposition 47 or its alleged effect on section 466. (Slip Opinion at pp. 1-11.) Appellant implicitly accepted the Court of Appeal's statement of the issues by failing to file a petition for rehearing. (See Cal. Rules of Court, rule 8.500, subd. (c)(2).)

Appellant also did not include the Proposition 47 issue in his petition for review. He expressly framed the issue as "Does the definition of 'other

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[7] Appellant's Opening Brief.
[8] Appellant's Reply Brief.

instrument or tool,' within the context of Penal Code section 466, include *any* instrument or tool possessed with the intent to be used for burglary?" (Appellant's Petition for Review After the Published Decision of the Third Appellate District ("Petition for Review"), p. 2, original italics.) In reviewing the line of California cases interpreting section 466, appellant concludes, "[R]eview is necessary in this case to resolve an existing conflict among the appellate districts of this State and secure uniformity of decision as to the definition of 'other instrument or tool', within the context of Penal Code section 466." (Petition for Review, at pp. 12-13.) Notably absent from his petition is any reference to the alleged effect of Proposition 47 on the intent element for possession of burglary tools. (Petition for Review, at pp. 1-13.)

Only after this Court granted review did appellant re-raise the Proposition 47 issue in his opening brief. (AOBM 32-34.) However, his argument here is different than that presented in the Court of Appeal. There, appellant argued that his conduct constituted shoplifting under section 459.5. (AOB 35.) A generous reading of his argument there reflects his claim that the prosecution erred in charging him with possession of burglary tools when it could have only charged him with shoplifting after the passage of Proposition 47. (AOB 34-35.) Here, however, appellant's argument now includes a claim that he "is entitled to benefit from the enactment of amendatory statutes while his case is on appeal" and that Proposition 47 "operate[s] retroactively so the lighter punishment will be imposed." (AOBM 35.) The retroactive application of Proposition 47 is a different issue than whether the prosecution could have properly charged him with possession of burglary tools, which was presented to the Court of Appeal. (AOB 35.) Therefore, the Proposition 47 issue included in appellant's Opening Brief on the Merits was not presented to the Court of Appeal and is thus not properly before this Court.

In light of the procedural history, respondent submits that this Court's grant of review does not encompass the issue of whether Proposition 47 retroactively precludes appellant's conduct from the reach of section 466. (Cf. *Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 283, fn. 3 [plaintiffs' failure to seek rehearing or modification on factual issue in the Court of Appeal barred their complaint about it in the California Supreme Court].) Appellant failed to properly raise the issue in his opening brief in the Court of Appeal, failed to seek rehearing and clarification when the Court of Appeal ruled without reference to the issue, and failed to raise the issue in his petition for review in this Court. Therefore, the issue of whether Proposition 47 excludes appellant's conduct from the reach of section 466 is not properly before this Court. (See *People v. Crow* (1993) 6 Cal.4th 952, 960, fn. 7 [declining to address issue not addressed by the Court of Appeal in its opinion, not mentioned in defendant's petition for review, and not briefed by the parties].) This Court should thus decline to reach this particular issue.

2. The Safe Neighborhoods and Schools Act

On November 4, 2014, the voters approved Proposition 47, the Safe Neighborhoods and Schools Act (hereafter "the Act" or "Proposition 47"), and it went into effect the next day. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) One of the Act's stated purposes is to "require misdemeanors instead of felonies for non-serious, nonviolent crimes like petty theft and drug possession, unless the defendant has prior convictions for specified violent or serious crimes." (The Act, § 3, bullet point (3); § 16.) Specifically, the Act reduced the penalties for certain acts of grand theft (§ 487), receiving stolen property (§ 496), writing bad checks (§ 476a), check forgery (§ 473), petty theft with a prior conviction (§ 666) and drug possession (Health & Saf. Code, §§ 11350, 11357, 11377.) (The Act, §§ 6-13.) The Act also created several new Penal Code sections, including

the crime of shoplifting (§ 459.5), a new definition of petty theft (§ 490.2), and a new petitioning procedure that allows current prisoners to seek resentencing on eligible offenses (§ 1170.18). (The Act, §§ 5, 8, 14.)

The crime of shoplifting is defined as "entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950)." (§ 459.5, subd. (a).) Under the statute, "Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property." (§ 459.5, subd. (b).) The Act also added section 490.2, which defines petty theft as "obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950)," with the exception of persons having previously been convicted of certain offenses. (§ 490.2, subd. (a).)

The specific crimes amended by the Act were further explained by the legislative analyst in the Official Voter Information Guide:

> ***Grand Theft***. Under current law, theft of property worth $950 or less is often charged as petty theft, which is a misdemeanor or an infraction. However, such crimes can sometimes be charged as grand theft, which is generally a wobbler. For example, a wobbler charge can occur if the crime involves the theft of certain property (such as cars) or if the offender has previously committed certain theft-related crimes. This measure would limit when theft of property of $950 or less can be charged as grand theft. Specifically, such crimes would no longer be charged as grand theft solely because of the type of property involved or because the defendant had previously committed certain theft-related crimes.
>
> ***Shoplifting***. Under current law, shoplifting property worth $950 or less (a type of petty theft) is often a misdemeanor. However, such crimes can also be charged as burglary, which is a wobbler. Under this measure, shoplifting property worth $950 or less

would always be a misdemeanor and could not be charged as burglary.

Receiving Stolen Property. Under current law, individuals found with stolen property may be charged with receiving stolen property, which is a wobbler crime. Under this measure, receiving stolen property worth $950 or less would always be a misdemeanor.

Writing Bad Checks. Under current law, writing a bad check is generally a misdemeanor. However, if the check is worth more than $450, or if the offender has previously committed a crime related to forgery, it is a wobbler crime. Under this measure, it would be a misdemeanor to write a bad check unless the check is worth more than $950 or the offender had previously committed three forgery related crimes, in which case it would remain a wobbler crime.

Check Forgery. Under current law, it is a wobbler crime to forge a check of any amount. Under this measure, forging a check worth $950 or less would always be a misdemeanor, except that it would remain a wobbler crime if the offender commits identity theft in connection with forging a check.

Drug Possession. Under current law, possession for personal use of most illegal drugs (such as cocaine or heroin) is a misdemeanor, a wobbler, or a felony—depending on the amount and type of drug. Under this measure, such crimes would always be misdemeanors. The measure would not change the penalty for possession of marijuana, which is currently either an infraction or a misdemeanor.

(Official Voter Information Guide, Analysis by Legislative Analyst, p. 35, original bold and italics.) Neither the Act nor the Voter Information Guide mentions the crime of possessing burglary tools.

The Act also created section 1170.18, subdivision (f), which provides: "A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the

judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors." (§ 1170.18, subd. (f).) Subdivision (g) provides: "If the application satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor." Finally, most pertinent to the issue in this case is subdivision (k), which provides in relevant part: "Any felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes . . . ." (§ 1170.18, subd. (k).)

3. Proposition 47 does not serve to retroactively negate appellant's felonious intent at the time of his offense

Issues of statutory construction are questions of law that are reviewed de novo on appeal. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432; *People v. Whaley* (2008) 160 Cal.App.4th 779, 792.)

In interpreting a voter initiative, such as Proposition 47, the court applies the same principles that govern the construction of a statute. (*People v. Canty* (2004) 32 Cal.4th 1266, 1276.) This "begins with the words of a statute." (*Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1047 (*Diamond*), citing *Hsu v. Abbara* (1995) 9 Cal.4th 863, 871.) If the statute is clear and unambiguous, the inquiry ends. (*Diamond*, at p. 1047.) "When statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it." (*People v. Hendrix* (1997) 16 Cal.4th 508, 512, internal quotation marks and citations omitted.) "But if the language is ambiguous, [the court can] consider extrinsic evidence in determining voter intent, including the Legislative Analyst's analysis and ballot arguments for and against the initiative." (*Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 444-445.) The

language of an enactment is usually more indicative of legislative intent than extrinsic aids to construction. (*People v. Knowles* (1950) 35 Cal.2d 175, 182-183.) "Generally, the drafters who frame an initiative statute and the voters who enact it may be deemed to be aware of the judicial construction of the law that served as its source." (*In re Harris* (1989) 49 Cal.3d 131, 136.)

Section 1170.18 contains no reference to section 466. At the same time, the resentencing provision *does* include several theft-related offenses that qualify for misdemeanor sentencing. (§ 1170.18, subd. (a).) Under the canon of *expressio unius est exclusio alterius*, the listing of certain crimes by statute number in section 1170.18 means that those not listed are excluded. (See *Gikas v. Zolin* (1993) 6 Cal.4th 841, 852 ["The expression of some things in a statute necessarily means the exclusion of other things not expressed"]; see also *Barnhart v. Peabody Coal Co.* (2003) 537 U.S. 149, 168 [when items expressed are members of an "associated group or series," it can be inferred that items not mentioned were intentionally excluded].) Because section 1170.18 does not contain a reference to section 466, while including other theft-related offenses, violations of that section are simply not within its purview.

Our Supreme Court has stated that "'insert[ing]' additional language into a statute 'violate[s] the cardinal rule of statutory construction that courts must not add provisions to statutes. This rule has been codified in California as [Code of Civil Procedure] section 1858, which provides that a court must not insert what has been omitted from a statute.'" (*People v. Guzman* (2005) 35 Cal.4th 577, 587, citations omitted.) The court has no power to add something to a statute to conform it to an assumed intent that does not appear from the statute's language. (*People v. Eckard* (2011) 195 Cal.App.4th 1241, 1248.) The court should not partially rewrite a statute unless it is "compelled by necessity and supported by firm evidence of the

drafters' true intent." (*Guzman, supra*, 35 Cal.4th at p. 587.) There being no such "firm evidence" of the voters' intent to reduce or negate the punishment for violations of section 466, this Court should not interpret Proposition 47 to include that section.

The appellate court's holding in *People v. Gray* (1979) 91 Cal.App.3d 545 is instructive. In that case, the court held that an enhancement for great bodily injury was properly applied to attempted murder because that crime was not among the four explicitly excluded from the enhancement statute. (*Id.* at p. 551.) The court explained: "The legislative inclusion of the four crimes as exceptions necessarily excludes other exceptions [citation]." (*Ibid.*) Similarly here, section 1170.18 lists a specific series of crimes, and that list does not include section 466. The legislative intent to limit application of the Act to the listed offenses is clear—the plain language of the statute states that those particular code sections have been "amended or added" by the Act. (§ 1170.18.) The logical inference is that any section not amended or added by the Act is not included or affected by the Act.

Notably, possession of burglary tools under section 466 is a misdemeanor. (§ 466.) In contrast, the crime of burglary is a felony.[9] (§§ 17, 460.) This distinction between burglary and possession of burglary tools is telling. "In terms of ultimate harm, [possession of burglary tools] is much more incipient than [burglary]; therefore, [possession of burglary tools] is ordinarily punished much less severely than the former one." (Wharton's Criminal Law, *supra*, at § 333.) As this Court has recognized, burglary laws "are primarily designed . . . not to deter the trespass and the intended crime, which are prohibited by other laws, so much as to forestall

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[9] First degree burglary is a felony. (§§ 17, 460.) With the exception of offenses constituting "shoplifting" under Proposition 47, second degree burglary is a "wobbler" that may be punished as a misdemeanor or felony. (*People v. Williams* (2010) 49 Cal.4th 405, 461, fn. 6.)

the germination of a situation dangerous to personal safety." (*Gauze*, *supra*, 15 Cal.3d at p. 715.)

One of the Act's stated purposes is to "require misdemeanors instead of felonies for non-serious, nonviolent crimes like petty theft and drug possession, unless the defendant has prior convictions for specified violent or serious crimes." (The Act, § 3, bullet point (3); § 16.) Proposition 47 does not target misdemeanor offenses, such as possession of burglary tools, which are distinguished from serious, violent crimes characterized as felonies. Given the Legislature's determination that burglary, a felony, is a more serious offense than possession of burglary tools, a misdemeanor, Proposition 47 should not be construed to intend collateral effects on persons convicted under section 466.

Adopting appellant's argument that Proposition 47 requires proof of the defendant's intent to not only commit theft or a felony, but that the property stolen must be valued over $950, would drastically narrow the category of offenses under section 466 and greatly limit the prosecution's ability to prosecute such an offense. As mentioned *ante*, the offense of possessing burglary tools is "complete when the tools [are] procured with a design to use them for a burglarious purpose. . . . It [is] not necessary to allege or prove an intent to use them in a particular place, or for a special purpose, or in any definite manner." (*Southard*, *supra*, 152 Cal.App.4th at p. 1088, citing *Commonwealth v. Tivnon* (1857) 74 Mass. 375, 380.) And, as this Court has recognized, the intent to commit burglary is usually proven by circumstantial evidence. (*People v. Holt* (1997) 15 Cal.4th 619, 669 [element of intent "is rarely susceptible of direct proof and must usually be inferred from all of the facts and circumstances"]; *People v. Cain* (1995) 10 Cal.4th 1, 47-48.) This would often be difficult, if not impossible, for the prosecution to prove whenever a suspect is found with an assortment of burglary tools. In such a scenario, the suspect would be

able to simply assert that he intended to enter a commercial establishment during regular business hours to steal less than $950 in property. Section 466 would essentially lose much of its effectiveness.[10] Nothing in Proposition 47, or its attendant Voter Information Guide, demonstrates that this is what the voters intended.

In addition, section 466 seeks to punish and deter any *theft*, not only felonies. The intent element in burglary encompasses both types of theft (grand and petit larceny). (§ 459.) As discussed *ante*, the intent element in burglary is the same as that required for possession of burglary tools. The burglary statute sought to punish and deter not only a defendant's interference with the victim's possessory interest in his home, which constitutes real property, but also sought to protect the victim's possessory interest in his personal property. (See *Gauze*, *supra*, 15 Cal.3d at pp. 712-713.) Similarly, as discussed *ante*, section 466 seeks to protect an individual's possessory interest in personal property. But the creation of the shoplifting statute under Proposition 47, which "carves out an exception to second degree burglary" (*In re J.L.* (2015) 242 Cal.App.4th 1108, 1114), does not similarly create an exception to possession of burglary tools. In other words, the focus on punishing and preventing possession of burglary tools to effectuate theft of any amount does not change.

Indeed, the language in the burglary tools statute itself contemplates punishment for possession of burglary tools with the intent to commit felony *or* misdemeanor theft. Section 466 punishes not only the principal

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[10] Of course, other circumstances may exist that circumstantially prove a defendant's intent to either use the burglary tools to enter a non-commercial establishment (*e.g.*, presence in a residential neighborhood at 3:00 in the morning) or that he intended to steal more than $950 in property (*e.g.* presence in a rented moving truck parked in front of an electronics store). Regardless, appellant's argument would result in unintended consequences in the enforcement of section 466.

who possesses an instrument or tool with a burglarious intent but also any person "who shall make, alter, or repair any instrument or thing, knowing or having reason to believe that it is intended to be used in committing a *misdemeanor or felony*." (§ 466, italics added.) In other words, section 466 additionally punishes any person who makes, alters, or repairs any instrument or thing with the knowledge, or reason to believe, that such an object is intended to be used for *unlawful* purposes, without regard to whether such purpose is to commit a misdemeanor or felony. (See *People v. Freeman* (1936) 16 Cal.App.2d 101, 104 [driving under the influence is an "unlawful act [that] must of necessity be either [a] misdemeanor or felony"].) Because it is a violation of the statute for a person essentially to provide a burglary tool to another, regardless of whether that other person intends to use it to commit a misdemeanor or felony, it is only reasonable to read section 466 as prohibiting the possession of a burglary tool with the intent to commit a felony or any theft, regardless of the value of the property stolen.

Even after Proposition 47, the use of the term "intent feloniously" in section 466 does not preclude a finding of the requisite intent even when the value of the property taken, or intended to be taken, does not exceed $950. Support for this conclusion is found by examining the statute's language—"with intent feloniously to break or enter into any building"—in the context of how the crime of theft has developed in California. (§ 466.)

The crime of theft is defined in section 484, which provides in relevant part: "Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another . . . is guilty of theft." (§ 484, subd. (a).) This definition "reflects its English common law roots." (*People v. Williams* (2013) 57 Cal.4th 776, 782 (*Williams*).) At common

law, theft[11] was defined as "the taking and carrying away of someone else's personal property, by trespass, with the intent to permanently deprive the owner of possession." (*Ibid.*) This crime was a felony, and all felonies were punishable by death. (*Ibid.*)

In 1275, the English Parliament began to limit punishment by death for theft offenses, distinguishing "grand" and "petit" theft. (*Williams*, *supra*, 57 Cal.4th at p. 782.) Both, however, remained felonies. (*Ibid.*) Theft "was, in essence, a *felonious* taking." (*Ibid.*, italics added.) As this Court observed long ago, "'steal' . . . has . . . a fixed and well-defined meaning," which was "[t]o take and carry away *feloniously*, as the personal goods of another." (*People v. Lopez* (1891) 90 Cal. 569, 572, italics added, internal quotations omitted.) In other words, a "felonious taking" was synonymous with "theft"; it is the theft—the deprivation of another's property—that is felonious. (See *People v. Montoya* (2004) 33 Cal.4th 1031, 1037 [claim of right negates "the felonious-intent-to-steal element" of theft]; *People v. Tufunga* (1999) 21 Cal.4th 935, 946 ["the felonious taking or *animus furandi* element [was] common to [both] theft and robbery when [the Legislature] first codified those offenses in the 1850 statutes"].)

As demonstrated, the term "felonious" in the context of theft-related offenses is a remnant of common law carried over into California statutes used to define theft, *regardless* of the value of the property stolen. Similarly, as used in section 466, the phrase "intent feloniously" includes

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[11] *Williams* refers to "the crime of theft by larceny." (*Williams*, *supra*, 57 Cal.4th at pp. 781-782.) Because larceny, embezzlement, and stealing were consolidated into a single crime of "theft," respondent refers only to the crime of "theft." (§ 490a; see *People v. Gonzalez* (March 23, 2017, S231171) __ Cal.5th __ at p. *3 [2017 WL 1090536] [section 490 "reflected the fact that the definition of theft encompassed all three ways [larceny, false pretenses, and embezzlement] in which property could be unlawfully stolen"].)

the intent to commit theft, regardless of the value of the property taken and whether the theft constitutes a felony after the passage of Proposition 47. (See *Carter v. United States* (2000) 530 U.S. 255, 266 ["we have not hesitated to turn to the common law for guidance when the relevant statutory text does contain a term with an established meaning at common law"]; *People v. Tufunga*, *supra*, 21 Cal.4th at p. 946 [by adopting the phrase "felonious taking" as used in the common law with regard to theft and robbery statutes, the Legislature in all likelihood intended to incorporate the same meanings attached to those phrases at common law].) Therefore, whether or not appellant intended to steal property valued over $950 is ultimately irrelevant to his conviction under section 466.

CONCLUSION

For the foregoing reasons, respondent respectfully requests this Court to affirm the judgment and sentence.

Dated: March 30, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 9,464 words.

Dated: March 30, 2017

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Attorney General of California

S/ *F. MATT CHEN*

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re H. W.** No.: **C079926 / S237415**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On March 30, 2017, I served the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 30, 2017, at Sacramento, California.

_____
Declarant

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